United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B

74-1279

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1279

JORDAN BROWN and all others similarly situated,
Plaintiff-Appellee,

–against–

FIRST NATIONAL CITY BANK,
Defendant-Appellant.

ON APPEAL from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT of NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Preliminary Statement

This brief is submitted on behalf of defendant-appellant First National City Bank ("Citibank") in reply to the brief of plaintiff-appellee Jordan Brown. Arguments I through III are directed at the rather scattered and strained arguments offered by plaintiff in response to the corresponding parts of Citibank's main brief. Argument IV is directed at the fact that this Court lacks jurisdiction to entertain plaintiff's cross-appeal and Argument V deals with plaintiff's arguments on the alleged merits of the cross-appeal.

ARGUMENT

I

The District Court Erred in Granting Summary Judgment and Injunctive Relief to Plaintiff and Should Have Held That Citibank's Extensions of Credit to Plaintiff Constituted Loans for Which Interest Could Be Charged.

Plaintiff's brief demonstrates a basic misunderstanding of fundamental concepts such as "demand deposits," "reserve requirements," "lines of credit," "presentment," "payment," and "honoring" of checks, etc., as well as of the interrelationships between these concepts and their import and applicability to the facts of this case. Defendant submits that plaintiff's misunderstandings in this regard, or, alternatively, his attempts at obfuscation, should be recognized and discounted by this Court.

A. The Crediting of Funds to Plaintiff's Checking Account Pursuant to the Checking Plus Agreement Constituted Loans or Advances Made to Plaintiff

When Citibank credited plaintiff's checking account with an appropriate multiple of $100, in response to plaintiff's overdraft checks and pursuant to the Checking Plus agreement (the "Agreement") between Citibank and plaintiff, it, in fact, loaned or advanced to plaintiff the amount so credited. The amount loaned or advanced in each case was applied to cover plaintiff's overdraft and the remainder constituted a deposit in plaintiff's checking account, *i.e.*, a "demand deposit." This "demand deposit" was then available for plaintiff's immediate and unrestricted use and represented an indebtedness owed by Citibank to the plaintiff. (Citibank's main brief, hereinafter "Def. Br.", p. 16).

Citibank demonstrated the distinction between deposits in a checking account and the future and contingent availability of a "line of credit" under the Agreement, pointing

out, *inter alia*, that plaintiff had no vested right to the line of credit and, more importantly, that it did not represent an indebtedness owing from Citibank to plaintiff. (Def. Br., pp. 14-15) Plaintiff confuses the crucial distinction between "demand deposits" and "lines of credit" as an argument relating to the interpretation of the language of § 108(5)(a) of the New York Banking Law (Plaintiff's brief, hereinafter "Pl. Br.", p. 20) and counters with the *non sequitur* that Citibank's right of cancellation with respect to the "line of credit" is irrelevant since it was not exercised and that the distinction between "demand deposits" and "lines of credit" did not affect the question of statuory compliance (which Citibank never claimed it did, Def. Br., pp. 14-15).

Plaintiff further demonstrates a basic misunderstanding of the banking process when he argues that the "reserve requirements" that obtain when Citibank credits a Checking Plus customer's checking account with loans in the appropriate multiple of $100, rather than operating as a detriment to Citibank, actually operate as a benefit by increasing Citibank's lending power six-fold (Pl. Br., pp. 39-41). This argument is not only irrelevant, but it is wrong.*

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* A deposit in a national bank imposes upon that bank a requirement to maintain a reserve against that deposit. Assets eligible to be set aside to meet this reserve requirement must be in the form of (1) balances maintained with a Federal Reserve Bank or (2) currency and coin held by the bank (Def. Br., p. 17). Before a bank may make a loan by crediting the borrower's account in the amount thereof, it must have available reserve assets (equal to approximately 18% of the deposit in the case of a credit to a "demand deposit" account) which can be set aside as reserves to support the deposit that it is creating as a result of the loan.

When a bank's customer makes a deposit to the bank of cash or a check drawn on another bank, he increases the reserve assets available to the bank. If the deposit is a demand deposit, approximately 18% thereof will be needed as a reserve to support the deposit. However, the remainder (82%) then becomes available to support deposits of other customers (including deposits to their accounts re-

B. Citibank did not Record Plaintiff's Checking Plus Account, and, Therefore, did not Charge Plaintiff Interest on the Resulting Loans, Until After Plaintiff's Overdraft Checks were Honored by Citibank

A bank "honors" a check when it pays it, Uniform Commercial Code ("U.C.C.") § 1-201(21), *i.e.* when it pays the item in cash to the holder or settles for the item with the presenting bank, U.C.C. § 4-213. "Presentment", as it relates to a check, is a demand for payment of the check, U.C.C. § 3-504. When a check is presented to a bank by a non-bank holder for payment, the bank must make payment or dishonor the check before midnight of the next banking day, U.C.C. §§ 4-104, 4-302(a), although as a practical matter, when a check is presented for payment by an individual holder thereof, the check will have been paid or dishonored before he leaves the bank. When a check is presented for payment by a clearing house, or by the depository bank or an intermediary bank (U.C.C. § 4-105), it

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(Continued from page 3)

sulting from loans made by the bank) in an amount equal to roughly five times such remainder. This, however, is not what occurs when Citibank makes a Checking Plus loan.

When a Checking Plus customer overdraws his checking account, Citibank makes a loan to such customer by depositing to his account the necessary multiple of $100 to cover that overdraft. This transaction does not add to Citibank's reserve assets, as would a deposit by another customer; rather, it represents the creation of a deposit by Citibank and the deposit so created must itself be supported by reserves. Since Citibank frequently must use reserve assets to pay the check which created the overdraft, a Checking Plus transaction of this type can require Citibank to utilize reserve assets on hand prior to the transaction in an amount equal to 100% of the check creating the overdraft plus 18% of the remainder left on deposit.

A Checking Plus loan, therefore, rather than increasing Citibank's lending power, actually utilizes Citibank's lending power, which, as described above, resulted from deposits of cash or checks drawn on other banks made by other customers. The making of such loan, then, at least as far as "reserve requirements" are concerned, represents a detriment, not a benefit, to Citibank.

must be paid or returned before midnight of the banking day of receipt, U.C.C. § 4-302(a). Thus, the "presentment" and "honoring" of a check will normally occur during the same business day. Plaintiff's assertion, therefore, that a check is not honored for four or more business days after its presentment is totally unfounded (Pl. Br., p. 37).

Citibank debits a customer's checking account only after a check drawn against that account has been presented to Citibank for payment, generally by another bank. Indeed, Citibank could not debit the account before presentment of the check on it, since it could not know of the check before such presentment. When Citibank is presented with an overdraft check drawn by a Checking Plus customer, it makes payment of or settlement for that check and debits the customer's checking account accordingly, creating a negative balance in the account. This negative balance then sets in motion the procedure whereby the appropriate multiple of $100 is credited to the customer's checking account and the outstanding balance, if any, in his Checking Plus account is increased in the same amount. In plaintiff's case there was a delay of one to three days between the time when plaintiff's checking account was debited and the time when the appropriate multiple of $100 was charged to his Checking Plus account (Def. Br., pp. 11-12), although the loans to plaintiff, to the extent his overdraft checks were covered, were actually made and Citibank thus became legally entitled to receive interest, when the checks originally were paid.

Plaintiff completely misconstrues and misrepresents Citibank's statements when he asserts that Citibank charged interest on the loans made prior to the time Citibank honored plaintiff's checks (Pl. Br., pp. 36-37, 49). Such an assertion is totally false and another example of the semantic gymnastics and misleading statements employed by plaintiff throughout his brief.

C. Deposits to Plaintiff's Checking Account in Multiples of $100 Pursuant to the Agreement Did Not Constitute "Forced Deposits" or "Compensating Balances"

Plaintiff attempts to equate his option under the Agreement, whereby he could have obtained loans in multiples of $100 by overdrawing his checking account, with the situation where a bank makes it a condition of the loan that the borrower deposit half of the proceeds thereof with the bank for the period of the loan (Pl. Br., pp. 12-13).* This comparison lacks any substance in fact or in law.

The amounts credited to plaintiff's checking account pursuant to the Agreement constituted "demand deposits" against which plaintiff had an immediate and unqualified right to, and did in fact, draw. Such "demand deposits" constituted debts of Citibank to plaintiff payable at his instance. Citibank did not "force" plaintiff to leave any amount on deposit with it; nor did it "force" plaintiff to obtain loans in an amount in excess of his requests therefor. Plaintiff could have at any time obtained loans in any specific amount other than a multiple of $100 pursuant to the Agreement. (See Def. Br., p. 40). Plaintiff chooses to ignore this alternative which was and is available under Citibank's Checking Plus Agreement and instead blatantly attempts to confuse the Checking Plus account with Ready-Credit, a separate credit plan not at issue here (Pl. Br., pp. 10-12).

Plaintiff's citation of voluminous authority, none of which bears any relation to the factual situation presented by this case, in support of the general propositions that a lender "may not 'secure any profit or advantage in excess of the return permitted by law'," and that "schemes to disguise . . . usurious transactions" are not countenanced

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* The only authority cited by plaintiff in support of this strained argument involved a completely different issue and did not contain any discussion or analysis of the usury laws. A. D. AUSTIN AND E. H. SOLOMON, *The Antitrust Implications of Compensating Balances,* 58 Va. L. Rev. 1 (1972).

(Pl. Br., pp. 17-19) is inapposite to the questions presented by Citibank's appeal. There are no disguised devices or hidden charges or expenses contained in the Agreement. Indeed, the Court below found that the terms of the loans or advances to be made pursuant to the Agreement were "clearly spelled out therein" (A 66; Def. Br., p. 23). The Agreement fully disclosed the methods by which loans might be obtained and the basis upon which interest on such loans would be calculated and charged. Furthermore, plaintiff himself apparently agrees that the Agreement did not fail to disclose any material information since he did not allege any Truth-in-Lending violations in his complaint. Plaintiff received monthly statements fully disclosing and describing the loans made by Citibank and, in October, 1972, plaintiff applied for and received a substantial increase in the maximum credit available under the Checking Plus Agreement (A 37, 48).

Plaintiff implores the Court to investigate and determine the "real nature and character" of the transactions which form the basis of this action, yet it is he who attempts to force the transactions into a mold which they do not fit and thereby frustrate examination of the "true nature" of the transactions (Pl. Br., p. 12). The attempt to analogize this case with those involving "forced deposits" or "compensating balances" does not survive analysis of the true nature and substance of Checking Plus loan transactions.

II

Citibank's Loans to Plaintiff in Multiples of $100, at Plaintiff's Request and Pursuant to a Lawful Credit Agreement Entered into by Plaintiff, Were in Conformity with Applicable Law.

Plaintiff continues to avoid dealing with the terms of the Agreement and the provisions of the applicable statute in their totality. Rather, he dwells only on portions of each, and even then takes such portions out of context, twisting the language to suit his purposes. Nevertheless, the lan-

guage of the statute must be read and applied, as a composite legislative enactment, to the whole of the Agreement and the transactions thereunder in determining whether Citibank has complied with the law.

A. Citibank's Checking Plus Agreement Provided Plaintiff With an Option as to the Amount of the Loans He Received

Plaintiff either completely misunderstands or seeks to confuse the facts relating to the options given to Checking Plus customers for obtaining loans pursuant to the Agreement.

Under the terms of the Agreement, a customer may obtain loans in either of two ways: (1) by providing Citibank with written authorizations to transfer specified amounts to his checking account or (2) by overdrawing his checking account and obtaining loans or advances in multiples of $100. The choice as to the method of obtaining the loan, and thus as to the amount of the loan, rests with the borrower (Def. Br., pp. 23, 25). Plaintiff Jordan Brown chose to use the latter method, unrestricted by any coercion by Citibank.

Plaintiff now attempts to ignore the clear language of the Agreement and argues that he did not have an option as to the method of obtaining, or the amount of, the loans made to him pursuant to the Agreement. Somewhat disingenuously,* plaintiff asserts that he did not have the option to

* Plaintiff's counsel is fully familiar with the difference between Citibank's Checking Plus plan and its Ready-Credit plan. On the same day he brought this action, plaintiff's counsel herein filed another action against Citibank alleging that Ready-Credit account customers are charged interest on interest, *i.e.*, that interest is compounded. *Rosenspan v. First National City Bank*, Civ. No. 72-4515 (S.D.N.Y., filed October 24, 1972). Defendant's renewed motion for summary judgment on such allegation in *Rosenspan* is presently pending before Judge Duffy. The same allegation was made with respect to Citibank's Checking Plus plan in this action below and the District Court, in its Order of January 28, 1974, granted Citibank summary judgment on that issue, a critical fact conveniently ignored by plaintiff in his summary of the proceedings below (Pl. Br., p. 4).

obtain loans in specific amounts pursuant to the Agreement because he did not have a Ready-Credit account. This is simply untrue.

Citibank's Ready-Credit plan is completely separate and distinct from its Checking Plus plan; in fact Ready-Credit accounts do not operate in conjunction with checking accounts, whereas Checking Plus accounts, as their name indicates, must be used in conjunction with regular or special checking accounts. The availability of the Ready-Credit plan in no way affects the option, under the Checking Plus plan, of obtaining loans in specific amounts other than multiples of $100, depending on the choice of the borrower.

Contrary to his assertion, plaintiff Jordan Brown did have an option under the Agreement to obtain loans, to be credited to his checking account, in any amount he chose. The fact that he did not choose to exercise this option and draw down loans in amounts other than $100 multiples, as other customers of Citibank have, does not support a finding that Citibank's Checking Plus plan does not comply with § 108(5) of the New York Banking Law.*

B. Section 108(5)(a) Does Not Prohibit, But Rather Permits, The Making of Loans in Multiples of $100

Plaintiff contends that § 108(5)(a) of the New York Banking Law is "an unambiguous statute" (Pl. Br., p. 21) containing a "statutory requirement that the loan be commensurate with the amount of the overdraft" (Pl. Br., p. 16) and mandating that a bank loan "no more than is necessary to 'honor' a check drawn upon an overdrafted

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* Plaintiff's statement that "[i]n order to open a Checking Plus account, it is mandatory that an agreement be signed which allows the bank to 'use the $100 multiple practice'," (Pl. Br., p. 34) is simply incorrect. The Agreement does not allow Citibank unilaterally to use any practice; rather it allows the customer to choose the method used to obtain the loan or advance as well as the amount thereof.

account." (Pl. Br., p. 21). The fact is that the plain language of § 108(5)(a) does not prohibit the making of loans in an amount in excess of the overdraft created in a customer's account. On the contrary, § 108(5)(a) is devoid of any reference to "overdrafts" and contains no language which operates to limit the amount of the loans made to a customer pursuant to that section of the Banking Law.

If the New York Legislature had intended to include language in § 108(5) which would limit loans made thereunder only to the amount in which a customer had overdrawn his checking account, it certainly could have drafted clear language to effect that result. Former Article 12A, § 17:9A-59.3, of the New Jersey Statutes Annotated (see Def. Br., p. 19) is an example of legislative language which limits the amount of a check-credit loan. It reads:

> "Each check drawn by the borrower and paid by the bank as authorized by section 1 of this act shall be evidence of a loan made by the bank to the drawer of the check in the amount of such check. Each check so drawn and so paid shall constitute a separate check-loan and the date of the payment by the bank of each such check shall be the date of the check-loan." N.J.S.A., Article 12A, § 17:9A-59.3 (1963).

It would have been a relatively simple matter for the New York Legislature to include language in § 108(5) which stated than an overdraft check would be evidence of a loan in the amount of such overdraft. The fact is that it did not do so, and for good reason.

At the time of the enactment of § 108(5) in 1960 there was a recognized need for some type of readily available credit as borrowers sought the convenience of being able to obtain loans without having to make a personal application to a bank each time they needed credit. Check-credit plans similar to the one at issue herein did not then exist in

New York, as conceded by plaintiff (Pl. Br., pp. 25, 49)*. Accordingly, § 108(5) of the New York Banking Law was designed in a flexible manner to provide for a then unknown variety of check-credit and revolving loan plans which banks might develop to facilitate the desired expansion of the availability of convenient consumer credit. The statute, therefore, was broadly worded, and thus ambiguous to a certain degree, to allow banks a certain flexibility in developing plans to meet this need and yet provide the banks with a reasonable rate of return.

Section 108(5), then, was not enacted as "remedial legislation", as plaintiff asserts without any citation of authority (Pl. Br., p. 20). There were no "abuses" noted by Assemblyman Stephens, the sponsor of the bill which added § 108(5), in his accompanying memorandum. Rather, as Mr. Stephens stated, the purpose of the legislation was to "clarify the position of banks lending under various types of revolving credit or check-credit plans" (Def. Br., p. 28). Section 108(5) was also intended to facilitate the development of check-credit and revolving loan plans** and to provide banks with an exemption from the general usury statute (New York General Obligations Law, § 5-501 *et seq.*) so that banks might realize a reasonable rate of return on such plans. Clearly, then, any plan which facilitates the desired

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* There were "various types of revolving credit or check credit plans" being offered in New York State prior to the enactment of § 108(5), as Assemblyman Willis Stephens indicated in his memorandum accompanying the bill which added that section to the Banking Law. However, no such plans operated in conjunction with a customer's checking account, *i.e.*, a "demand deposit" account, as does the Checking Plus plan (Def. Br., p. 28).

It is clear, nevertheless, that loan plans which operate in conjunction with a customer's checking account were contemplated by the Legislators since § 108(5)(f) specifically provides that the loan or advance may be "disbursed by crediting a demand deposit account".

** Assemblyman Stephens further noted in his memorandum that § 108(5) was added because existing legislation did not "clearly provide for the various situations which arise under these newer forms of revolving credit lending." (Def. Br., p. 28).

result and does not violate the terms of the statute is legal. Citibank's Checking Plus Agreement provides for such a plan.

Plaintiff continues to ignore the language contained in § 108(5)(a) which reflects the flexibility intended by the Legislature, and instead focuses on only part of the language of that section, thereby attempting to mislead the Court in order to induce it to construe and apply the statute in an artificial and narrow fashion, as did the District Court (Pl. Br., pp. 7, 15, 19, 27) (See Def. Br., pp. 23-25). Section 108(5)(a) provides that a bank may establish "credits under written agreements" pursuant to which "loans or advances* to or for the account of a borrower may be made . . . by means of honoring one or more checks or other written orders or requests of the borrower".

As is demonstrated in Citibank's main brief (Def. Br., pp. 23-25), the loans made to plaintiff in multiples of $100 in response to his overdraft checks were made "by means of honoring one or more checks" as well as "by means of honoring . . . other written orders or requests of the borrower".

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* It matters little whether the credits made to plaintiff's checking account pursuant to the Agreement are called "loans" or "advances." Either "loans" *or* "advances" may be made under the terms of the statute "by means of honoring one or more checks *or other written orders or requests of the borrower*" (emphasis added). Plaintiff's attempt to construe the statute as allowing "loans" to be made by means of "honoring one or more checks," and "advances" to be made by means of "honoring . . . other written orders or requests" flies in the face of a common sense reading of the words used in the statute (Pl. Br., p. 27).

Citibank posed a distinction between the terms "loans" and "advances" as used in the statute (Def. Br., pp. 18-21) because of the District Court's erroneous finding that the funds made available for plaintiff's use pursuant to the Agreement did not constitute "loans". Citibank contends that, whether the amounts credited to plaintiff's checking account constituted "loans" or "advances" as those terms are used in § 108(5)(a), the Checking Plus plan complies with the requirements of the statute.

C. The Agreement Does Not Impose Any Additional Sacrifice on the Borrower As a Condition to the Credit Extended Pursuant Thereto

Section 108(5)(f) of the New York Banking Law provides that:

> "(f) No bank or trust company shall require a borrower to keep any sum on deposit, or to make deposits in lieu of regular periodic installment payments, or to do or refrain from doing any other act which would entail additional expense or sacrifice, as a condition precedent to the entering into of the agreement or granting of a loan or advance under the authority of this subdivision . . . ."

Plaintiff argues that the crediting of funds to plaintiff's checking account in multiples of $100 pursuant to the Agreement violates § 108(5)(f) because "it forces plaintiff to borrow excessive funds, forces him to pay excessive interest charges and forces him to maintain excessive checking account balances" (Pl. Br., p. 17). Plaintiff's factual assertions, as well as his conclusion therefrom, are totally erroneous.

Citibank has at no time "forced" plaintiff to do anything, either at the time the Agreement was entered into or when plaintiff requested and obtained any of his five loans during the months of August and September, 1972, or at any time thereafter.

Plaintiff chose to enter into the Checking Plus Agreement with Citibank, as opposed to taking advantage of other plans offered by Citibank, such as Ready-Credit, or the variety of plans offered by other New York banks.* There was certainly no "additional expense or sacrifice" imposed on plaintiff by Citibank as a "condition precedent

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* With all of which plaintiff's counsel is thoroughly familiar.

to the entering into'' the Agreement. The Checking Plus plan was made available to plaintiff on the same conditions as it is to all other of Citibank's checking account customers.

Furthermore, considering the alternatives open to plaintiff, both at Citibank and elsewhere, for obtaining convenient credit, the Agreement does not represent a ''contract of adhesion'' as plaintiff asserts (Pl. Br., p. 34). Citibank did not stand in a position of dominance *vis-a-vis* plaintiff prior to the entering into of the Agreement or at any time thereafter since plaintiff was completely free to select the amount of money which he borrowed and could have drawn down loans in amounts other than $100 multiples. Moreover, plaintiff was completely free to reject Citibank's Checking Plus plan and take advantage of the plans of other banks which plaintiff now claims are not as venal as Citibank's (Pl. Br., pp. 25, 39, 42)*.

The Agreement does not ''force'' plaintiff to ''borrow excessive funds''. As has already been demonstrated at length, the determination as to the amount of the loans drawn down by plaintiff at any given time rested solely with plaintiff himself. Plaintiff chose to obtain his loans in multiples of $100 by writing checks which overdrew his checking account and in fact eliminated the full $100 multiple credit deposited in his checking account either on the same day the loan was made or within a very short time thereafter (Def. Br., pp. 5-11).

Interest was charged to plaintiff on the loans made to him pursuant to the Agreement at the rate provided in § 108(5)(b). (See Def. Br., p. 22, footnote). No ''excessive interest charges'' were ''forced'' on plaintiff; rather, Citibank charged plaintiff interest at the legal rate on the

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* Plaintiff's counsel continues to employ typically "bootstrap" arguments by citing here as authority the allegations of his own complaint (¶ 15) in *Rothenberg v. Chemical Bank New York Trust Co.*, Civ. No. 74-600 (S.D.N.Y., filed March 4, 1974) (Pl. Br., p. 42).

amounts loaned to plaintiff pursuant to the agreement, which amounts were subject to plaintiff's immediate demand and were, in fact, used by him.

Further, plaintiff's assertion that Citibank "forced" him to "maintain excessive checking account balances" is simply specious and contrary to the fact. Plaintiff was free to maintain any balance he chose in his checking account. He could have kept his account at a zero balance by drawing down loans in specific amounts other than $100 multiples pursuant to his option under the Agreement. Plaintiff also could have maintained a zero balance, using the method he did to obtain loans, by immediately* drawing checks against or otherwise eliminating his "demand deposits" and using those funds as he chose, including placing them in an interest-bearing account at any bank. The fact is that plaintiff did not choose to maintain his checking account balance at any lower level, and in fact maintained his checking account balance at a higher level during the months when he did not obtain loans (July and October, 1972), than during the two months prior to the filing of the complaint herein when he did obtain loans (August and September, 1972) (Def. Br., p. 18, footnote, and p. 40).

D. The History of Section 108(5) Indicates Both Legislative and Administrative Approval of Check-Credit Loans in Multiples of $100

Plaintiff argues that the failure of the Legislature to take action to prohibit check-credit loans in multiples of $100, despite numerous amendments to § 108(5) since its enactment, indicates, not legislative approval of the use of $100 multiples, but rather that the Legislature did not consider such remedial legislation necessary. Action by the Legislature could be deemed unnecessary for only two reasons: (1) the Legislature approved of the practice, or (2)

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* Indeed, plaintiff effectively did so on 2 of the 5 loans at issue herein (Def. Br., p. 13, footnote).

the Legislature was ignorant of the practice. However, as the *amicus* brief filed herein indicates, the practice of making check-credit loans in multiples of $100 has been well established among banks throughout the entire State of New York for a number of years. And, as the New York Court of Appeals held in *Zachary v. Macy & Co.*, 31 N.Y. 2d 443 (1972), ignorance by the Legislature of a well-established commercial practice is not to be presumed.

Moreover, it is significant that the appropriate state and Federal regulatory authorities have never questioned the validity of making loans in $100 multiples, despite their awareness of its long-standing commercial use. As the Supreme Court noted in *Louisville & Nashville Railroad Co. v. United States,* 282 U.S. 740, 759 (1931), "approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute". Only when the provisions of the statute are "clear and explicit" should such approval be disregarded (Pl. Br., p. 23). However, § 108(5) of the New York Banking Law, by design of the Legislature, is a broadly drawn statute that is potentially ambiguous and may be subject to more than one interpretation. Therefore, plaintiff's assertion that the Court should ignore the application of § 108(5) by the New York Banking Department* and the Office of Comptroller of the Currency** is unsupportable (Pl. Br., pp. 23-24).

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* Plaintiff's statement that "[t]he New York Banking Department has no jurisdiction over national banks" is both irrelevant to the issue and untrue. It is to state law, and therefore to state regulatory authority, that the National Bank Act (12 U.S.C. § 85) refers with respect to permissible interest which may be charged by national banks on loans. The fact that the New York State Banking Department has no general supervisory power over national banks does not detract from its authority to interpret New York State law governing personal loans and the interest rate to be charged thereon.

** Citibank did not rely in its main brief on any interpretation of § 108(5) by the Comptroller's Office and plaintiff's attack on that agency is unwarranted (Pl. Br., pp. 22-23). Nevertheless, it is equally true and similarly persuasive that the Comptroller's Office has never questioned the validity or legality of Citibank's Checking Plus plan despite its awareness of the terms and provisions thereof.

The inaction of the New York Legislature in the face of a practice that is well-established throughout the State of New York, as well as the tacit approval of the practice by the administrative agencies charged with enforcement of the applicable state law, is persuasive authority that the practice is in compliance with the law. *Louisville & Nashville Railroad Co, supra.* The history of § 108(5), therefore, supports the validity of the practice which plaintiff here seeks to challenge.

E. There Has Been No Showing That Citibank Knowingly Charged Interest at a Rate Greater Than That Allowed By Law or Acted with Any Usurious Intent.

Section 86 of the National Bank Act (12 U.S.C. § 86) requires a showing that the taking by a national bank of interest in excess of the legal rate be "knowingly" done. (See Def. Br., pp. 30-32.). Plaintiff disputes Citibank's assertion that no such showing has been made in this case, but cites no authority that supports his argument. None of the cases or other authorities cited by plaintiff on this point (Pl. Br., pp. 32-33), with the exception of *The Bank of the United States v. Waggener* which has been fully discussed previously (Def. Br., pp. 30-31), purport to interpret or even involve § 86 or any predecessor statute. The lack of authority supporting plaintiff's position becomes readily apparent when his argument degenerates to an irrelevant discussion of the concept of "willfulness" under the criminal laws. The simple fact is that there neither was nor is any intention or design by Citibank to extract interest at a higher rate than that allowed by law. Indeed as the record clearly indicates, Citibank did not charge plaintiff the full amount of interest to which it was entitled under the statute and the Agreement (Def. Br., pp. 11-12; A47).

III

The Public Policy Underlying the Usury Laws Did Not Render Illegal Citibank's Loans to Plaintiff.

The practice of making loans, as chosen by the borrower, in response to overdraft checks in multiples of $100 does

not violate the public policy underlying the usury laws. On the contrary, the additional bookkeeping undertaken and expense incurred by a bank when it must continually monitor its customer's checking account and respond to overdrafts therein by extending one or more loans to the customer whenever his checking account shows a negative balance, warrants the establishment by the bank of a minimum amount for such loans. Moreover, the language of the Legislature employed in § 108(5) of the New York Banking Law reflects an intent to provide a reasonable rate of return* to banks offering such plans and a recognition of the fact that banks cannot expect reasonable returns if loans are made solely in single or double-digit amounts (Def. Br., p. 37).

Plaintiff erroneously contends that Citibank's Checking Plus plan is unconscionable and cites several sections of the U.C.C. in support of his argument (Pl. Br., pp. 20, 33-34). However, the U.C.C. does not contain any provisions which apply to or govern bank loans and plaintiff's argument is, therefore, irrelevant. As indicated herein (Argument IB, *supra*), the U.C.C. does establish guidelines and limitations with respect to the processing of checks and the maintenance of checking accounts, but the legality of Checking Plus loans is not governed by such provisions. The Checking Plus account is not a checking account, it is a separate and distinct account which enables a customer to borrow funds in amounts chosen by the customer to be credited to the customer's checking account, as § 108(5)(f) specifically authorizes. Nevertheless, plaintiff's contention that Citibank's Agreement with him is unconscionable does not comport with the facts under any legal standards of

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* See, for example, § 108(5)(b), which provides for various methods for calculating interest on such loans, and § 108(5)(d)(1), which provides for a minimum payment of one-thirty-seventh of the indebtedness, based, however, on the maximum credit available, rather than the actual amount of the loan outstanding. Both of these subsections, as well as those noted previously (Def. Br., p. 37), provide banks with flexibility in obtaining a reasonable rate of return on these loans.

unconscionability. The facts of this case do not reflect a situation where an unknowing customer has been overreached by a bank bent on exacting excessive interest.

Plaintiff opened his checking account with Citibank in July, 1972 with a deposit of $800. He applied for and was granted Checking Plus privileges. Plaintiff began the August cycle with a negative balance of $.45 and, during the course of that month, drew *six** checks amounting to $835.13. Pursuant to the Agreement and the requests of the plaintiff thereunder, therefore, plaintiff's checking account was credited, on four occasions, with a total of $900 in loans. When check charges ($.90) and service charges ($.25) and the initial account deficit ($.45) are added to the sum of the checks drawn, the total is $836.73. The difference between that amount and the total amount loaned pursuant to the Agreement in that same period was $63.27, or a little more than $10 per check.** In September, 1972 plaintiff drew five checks in the amount of $271.69 and obtained a loan of $200 pursuant to the Agreement. By September 25, 1972, plaintiff had eliminated any balances attributable to the $1100 in loans made by Citibank prior to the filing of the complaint in October, 1972 (Def. Br., pp. 6-10). Plaintiff's claims that Citibank loaned him excessive amounts and forced him to maintain deposits in his checking account are somewhat less than credible (Pl. Br., p. 17; Def. Br., p. 40).

Moreover, plaintiff actually benefited from the manner in which Citibank calculated interest charges under the Checking Plus plan.

Citibank charges interest on a Checking Plus loan from the time such loan is recorded in the Checking Plus account,

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* Not four as plaintiff asserts (Pl. Br., p. 14) (See A 39; Def. Br., pp. 6-8).

** Not $50 as plaintiff erroneously concludes (Pl. Br., p. 14).

which, in plaintiff's case, was anywhere from one to three days after the payment by Citibank of the check which set in motion the mechanisms by which the loans were made. However, Citibank was legally entitled to interest from the time of presentment and payment of the checks, which interest it did not charge for anywhere from one to three days after the checks were paid (Def. Br., pp. 11-12, footnote).

Moreover, Citibank calculated interest on the average daily balance of plaintiff's Checking Plus account, rather than calculating interest "for each month on a fixed amount selected from a schedule", which amount may exceed the average daily balance by $5.00. New York Banking Law § 108(5)(b). (See Def. Br., p. 39). Plaintiff attempts to rebut Citibank's reference to this fact by asserting that Citibank's "contention would only be true if actual overdrafts were exceeded by 'not more than $5.00'." (Pl. Br., p. 37). That statement reflects a misunderstanding of the meaning of § 108(5)(b)(iii). It is the sum of average daily balances which must be compared to the five-dollar tolerance, not the amount of individual overdrafts. Furthermore, defendant's analysis of § 108(5)(b) was designed to indicate only some, not all, of the additional charges that legally could be made, even if Citibank extended its check-credit loans only in the exact amount of the overdraft.

Moreover, such additional charges could be made under Citibank's Checking Plus plan as presently constituted and are, therefore, charges that Citibank presently foregoes. As long as plaintiff admits that there are any additional charges that could have been made by Citibank pursuant to the provisions of § 108(5), then defendant's point remains valid, *i.e.*, Citibank did not make all of the charges that it was entitled to make under the statute and this fact negates any finding of "unconscionability" in the manner in which Citibank made loans to plaintiff under the Agreement.

Plaintiff again misrepresents Citibank's position when he attributes to Citibank a statement to the effect that

"banks are 'legally free' to make *business judgments on loans* based on the 'realities of the market place, rather than the compulsion of law'," (emphasis added) (Pl. Br., p. 35) and concludes that Citibank's position is tantamount to "asserting that banks are not subject to the usury laws." What defendant stated was that banks are "legally free to make reasonable decisions regarding the *minimum amount of the loans they make*" (emphasis added) and that they are not subject to any "compulsion of law" in this regard (Def. Br., pp. 35-36). Usury laws govern the rate of interest to be charged for the loan of money, not the amount in which such loans may be made, and plaintiff's attempt to impute to Citibank a disregard of the public policy underlying the usury laws is totally unfounded.

Plaintiff caps his attempts to misrepresent and misconstrue Citibank's position with the statement that it is "*undisputed* that a higher effective rate of interest than permitted by § 108(5) results from the $100 multiple practice," and "[is *undisputed*] that loans and deposits greater than the amount which would have been credited by 'honoring' checks in accordance with the statute have been forced upon plaintiff and other bank customers, resulting in higher interest costs to them" (emphasis added) (Pl. Br., p. 28). Such statement substitutes misstatement for legal argument. Indeed, what plaintiff contends is "undisputed" is precisely the subject to which this appeal is directed.

Citibank contends that the practice of making loans pursuant to the Agreement in appropriate multiples of $100, to customers* such as plaintiff, who choose to obtain loans in such fixed amounts by overdrawing their checking accounts, complies in all respects with the provisions of § 108(5) of the New York Banking Law, and that no in-

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* There has been no class determination pursuant to Rule 23 and plaintiff's "calculations" based upon a misquotation and a misunderstanding of defendant's position with respect to the "class" issue, and the false assumption that all Checking Plus customers have transacted business with Citibank in a manner similar to plaintiff herein, are simply wrong (Pl. Br., p. 38).

terest charges are made in excess of those permitted by § 108(5). Plaintiff's assertions of illegality fall far short of providing any convincing grounds for reaching that conclusion.

IV

This Court Does Not Have Jurisdiction to Entertain Plaintiff's Cross-Appeal.

While this Court does have jurisdiction to consider Citibank's appeal of paragraph 5 of the District Court's Order of January 28, 1974, which paragraph contains injunctive relief against Citibank and decides the underlying substantive issue directly related to such injunctive relief'* it does not have jurisdiction to consider plaintiff's cross-appeal of "so much of decretal paragraph number 4 of the Order . . . as denies injunctive relief with respect to plaintiff's cross motion for summary judgment." (A74).

Plaintiff's attempt in his Notice of Cross Appeal to characterize his appeal as one from the denial of injunctive relief is unavailing. Plaintiff did not raise his challenge to Citibank's practice of "not deducting deposits to [his] checking account from the Checking Plus loan balances" anywhere in his complaint (A7-13). This dubious claim was raised for the first time in plaintiff's affidavit in support of his motion for summary judgment and in opposition to Citibank's motion for summary judgment. However, plain-

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* In reviewing an order granting injunctive relief, an appellate court is not limited solely to a consideration of the order upon which the appeal is based, rather, its jurisdiction extends to "such questions as are basic to and underlie the order supporting the appeal." 9 MOORE, *Federal Practice* ¶ 110.25[1] (1973). *Accord: Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F. 2d 822, 826 (2d Cir. 1963) ("The striking of the affirmative defenses and the portion of the counterclaims for declaratory judgment which assert those affirmative defenses is so inextricably interwoven with those portions of the order which are clearly appealable that we shall proceed to consider the merits of the entire order.").

tiff did not seek injunctive relief in connection therewith (A48-54). Plaintiff now attempts by his cross-appeal to appeal from the denial of summary judgment on a substantive claim which is totally unrelated to the injunctive relief granted to plaintiff* that is the basis for this Court's jurisdiction of Citibank's appeal.

When an interlocutory order containing an injunction has been properly appealed and the order raises other issues or questions not appealable in themselves, "the appellate court will usually review only that part of the order which relates to the injunctive relief afforded or denied and only those questions basic to and underlying the specific order which supports the appeal." 9 Moore, *Federal Practice* ¶ 110.25[1] (1973). *Accord: Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 70 (2d Cir., Lumbard, Ch. J.), *cert. den.*, 385 U.S. 971 (1966); *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 868 (2d Cir. 1950).

Moreover, an appeal from an order granting or denying injunctive relief will not support review of an order denying, rather than granting, summary judgment.** 9 Moore, *Federal Practice* ¶ 110.25[1] (1973). *Accord: John Hancock Mutual Life Ins. Co. v. Kraft,* 200 F.2d 952, 953 (2d Cir. 1953); *Drittel v. Friedman,* 154 F.2d 653, 654 (2d Cir. 1946).

Plaintiff, by his cross-appeal, seeks to appeal (1) the denial of summary judgment (2) with respect to an issue that is not basic to and does not underlie the injunctive

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* Order of January 28, 1974, paragraph 5.

** Citibank has appealed from that portion of the District Court's Order of January 28, 1974 that grants summary judgment as well as injunctive relief to plaintiff on the $100 multiple issue. On the other hand, plaintiff cross-appeals from so much of the District Court's Order as denies relief with respect to plaintiff's cross motion for summary judgment on the question whether deposits to a checking account should constitute payments of the Checking Plus loan balance (A 74).

relief which supports Citibank's appeal. For both of these reasons, plaintiff's cross-appeal should be dismissed.

V

Neither the Agreement nor the Applicable Law Required That Citibank Apply Deposits to Plaintiff's Checking Account Towards Reduction of the Checking Plus Loan Balance.

Plaintiff erroneously argues that the failure of Citibank automatically to reach into plaintiff's checking account and deduct deposits therein from outstanding Checking Plus loan balances is illegal and unconscionable. This argument is totally unfounded.

The Agreement clearly spells out the manner in which payments to the Checking Plus account must be made as the Court below justifiably concluded (A 68). Moreover, the Court below further found that the requirement that payments be made to the Checking Plus account rather than the checking account did not violate § 108(5)(d) of the New York Banking Law, as plaintiff had argued, and did not "entail additional expense or sacrifice" as prohibited by § 108(5)(f) (A 68-69).

The District Court's decision on this question is correct. Indeed, there is no additional effort or inconvenience whatever imposed on the borrower by a requirement that, if he desires to make repayment of his Checking Plus indebtedness, he complete a Checking Plus payment ticket rather than a checking account deposit slip.

Plaintiff, in Point II of his brief, completely ignores the distinction between a deposit made to a checking account and a payment made to a Checking Plus account. A deposit to a checking account is a "demand deposit". It constitutes a debt owed by the bank to the customer payable upon demand. The depletion by the bank of the amount on hand in a customer's "demand deposit" account,

without express authorization and not pursuant to some legal right of the bank, might well be construed as a violation of the depositor's rights. On the other hand, a payment to a Checking Plus account constitutes a repayment, in whole or in part, of a debt owing from the borrower to the bank. These are two distinctly different transactions and they are kept separate for the benefit of both the customer and the bank.

It is in the customer's interest that deposits to his checking account not be automatically taken by the bank as payments of a Checking Plus indebtedness, and that he be allowed to control the disposition of his money. Deducting payments of the Checking Plus indebtedness from the customer's checking account would not only create a situation of uncertainty with respect to the status of the checking account at any given time, but would also restrict the options available to the customer for making payments to his Checking Plus account and considerably reduce the customer's flexibility in handling his money.*

The language of the very statutory provisions which plaintiff cites serve to defeat his arguments. Section 108

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* For example, were Citibank to do what plaintiff asserts is required by law, the following hypothetical could easily occur: The customer has reached his maximum borrowing limit (*e.g.*, $3000) under the Checking Plus Agreement and, with unpaid prior interest charges, his outstanding loan balance under his Checking Plus account is in excess of his maximum borrowing limit (*e.g.*, $3015). The customer then deposits an amount to his checking account (*e.g.*, $5000) which is more than sufficient to repay his entire Checking Plus indebtedness, intending to have a check in that amount certified by the bank. The bank, however, automatically applies the money deposited in the checking account towards repayment of the Checking Plus loan balance leaving the remainder on deposit in the checking account (in our example, $1895). When the customer then sought to have his check certified he would be considerably disappointed because the amount available for certification would be only that amount on deposit in the checking account ($1895); and even if funds up to the maximum borrowing limit were transferred from the Checking Plus account, the maximum available to the customer ($4895) would still be insufficient to allow certification of his $5,000 check.

(5)(d) requires that the "unpaid principal amount" of the loans shall be repayable "in substantially equal monthly installments." Such a requirement is inconsistent with a procedure whereby deposits to the checking account are treated as payments of the Checking Plus indebtedness, since most people don't make deposits to their checking account in equal monthly installments, and certainly cannot be required to do so. Moreover, § 108(5)(f), so often cited by plaintiff in his brief, prohibits a bank from requiring a borrower "to make deposits in lieu of regular periodic installment payments". The language of the statute itself, therefore, *prohibits* the very practice which plaintiff argues is required thereby.

Defendant submits that the lesson of *Zachary v. Macy & Co., supra,* supports its position in the case at bar. Plaintiff's lengthy discussion of *Zachary* is to no avail (Pl. Br. pp. 45-48). Citibank recognizes that there are certain factual differences between *Zachary* and the case at bar. However, *Zachary* reflects the attitude of and approach taken by the highest court in the State of New York when it rejected the unreasonable application, sought by plaintiff's counsel herein, of the State's usury laws to a long-standing and justifiable commercial practice.

Finally, with respect to plaintiff's rejection of the Court's approach in *Rollinger v. J. C. Penney Co.,* ____ S.D. ____, 192 N.W. 2d 699, 704-05 (1971) (Pl. Br., pp. 30-31), Citibank has always sought to "do equity" with regard to its Checking Plus borrowers, leaving to their free and informed choice the *amount* of the loan they could request, whether in some multiple of $100 or in any other greater or smaller amount. Since the Court below found plaintiff's claim that Citibank "compounded" its interest charges to be completely untrue, this action has been reduced to one where plaintiff is left to allege that the *amount* of the loans requested by plaintiff pursuant to his own selection of one of the two alternatives available under

the Checking Plus Agreement led to the exaction of usurious interest. Such an unprecedented result which could lead to the imposition of horrendous penalties should not be permitted in any event, but certainly should not be applied, if permitted, to the long-standing and previously unquestioned conduct of responsible businessmen in any fashion but prospectively.

Conclusion

Defendant respectfully requests that this Court reverse that portion of the Order from which Citibank appeals, dismiss plaintiff's appeal of paragraph 4 of such Order or, in the alternative, affirm such portion of the Order, and grant such other and further relief to Citibank as may be appropriate.

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May 23, 1974.

Respectfully submitted,

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